Datuk Sahar bin Arpan v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO M 05–23 OF 1999
MOKHTAR SIDIN, LOW HOP BING AND RAUS JJCA
15 DECEMBER 2006

Emergency Legislation — Corruption — Corrupt practice — Corrupt practice by member of state executive council — Taking part in decisions of the EXCO to approved applications by company in which he had an interest — Whether any nexus between accused and company receiving the benefit — Meaning of 'pecuniary advantage' — Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)

The accused was charged under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('the Ordinance') in the Melaka High Court. In essence, the three charges preferred against the accused ('the charges') were that at three separate meetings held at the meeting room of the Melaka State Executive Council ('the EXCO'), as a member of the administration, to wit, a member of the EXCO, committed corrupt practice by using his public position for his pecuniary advantage in that he did take part in the meetings and decisions of the EXCO in relation to three separate applications by Ivory Heights Sdn Bhd ('Ivory Heights') in which he had an interest. The defence submitted that the accused had no nexus with Ivory Heights, adding that the accused was not its alter ego. It was further submitted for the defence that the two cash cheques amounting to RM500,000 which the accused had subsequently deposited in his and his wife's accounts in the Melaka Lembaga Urusan Tabung Haji ('the LUTH accounts') were part of the sum of RM675,000 being the proceeds of sale of the accused's two pieces of agricultural land in the Mukim of Macap ('the Macap land') to SP52 vide a sale and purchase agreement dated 2 June 1995 ('the SPA'). After a protracted trial, the accused was found guilty and convicted. On each charge, he was sentenced to two years' imprisonment to run concurrently, and a fine of RM20,000 or six months in default ('the sentence'). He appealed against both conviction and sentence. It was also submitted for the accused that the sentence imposed was manifestly excessive.

Held, dismissing the accused's appeal against conviction and sentence:

(1) Under s 2(2) of the Ordinance, the expression 'member of the administration' has the meaning assigned to it in art 160(2) of the Federal Constitution. On the evidence adduced at the trial, it had been established and indeed it had never been disputed that on the dates stated in the charges, the accused was a member of the EXCO and hence a member of the administration as defined in s 2(2) (see paras 7–8).

(2) The learned trial judge was correct in his finding that the accused had used his public position as an EXCO member and participated in the deliberation of and approval for all the three applications by Ivory Heights in the three EXCO meetings (see para 14).

(3) The expression 'pecuniary advantage' in s 2(2) must be construed widely. It includes any benefit which may be measured or valued in monetary or financial terms. In the context of the facts in this appeal, the flow of the sum of RM500,000 to the LUTH accounts was clearly a pecuniary advantage accruing to the accused as a result of the accused using his public position as an EXCO member in the EXCO meetings, and so came within the ambit of corrupt practice under s 2(2) (see paras 22–23).

(4) The linkage, real and substantial connection or nexus between the accused and Ivory Heights had been constituted by the accused's systematic participation in the affairs of Ivory Heights right from the initial step on 22 February 1994 when he purchased Ivory Heights for RM2,300, followed by Ivory Heights' application for the State land, and the subsequent events as alluded until the recovery of the file of Ivory Heights together with its corporate documents and rubber stamp in his house, consequent upon a raid by ACA officers on 18 October 1996 (see para 46). There could be no doubt that on the facts, the accused was at all material time the directing mind and will of Ivory Heights, and controlled what it did, thereby making him the alter ego of Ivory Heights (see para 47). Further, in fact and in law, the accused was at all material times a shadow director of Ivory Heights. As a shadow director, he came within the ambit and purview of the word 'director' which is defined s 4(1) of the Companies Act 1965 as including 'a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act' (see para 50).

(5) The learned trial judge was justified in rejecting the defence. It was abundantly clear that the accused's device of the SPA had faltered. It was found to contain serious fundamental flaws and irregularities which had in reality revealed that the Macap land transaction was a camouflage apparently invented by the accused for the purpose of blurring or erasing the flow of the RM500,000 into the LUTH accounts. Upon a reasonable analysis and evaluation of the evidence adduced at the trial, it was clear that the RM500,000 in the LUTH accounts had actually originated directly, wholly and exclusively from the initial payment which SP52 had received from Tay Kim Pong pursuant to the share agreement in which SP52 had sold his share in Ivory Heights which owned the State land which in turn had been deliberated and approved by the EXCO pursuant to the three applications by Ivory Heights over which the accused had at all material times exercised de facto control (see para 54).

(6) The sentence imposed by the learned trial judge was well within the statutory maximum sentence prescribed in s 2(1) of the Ordinance. There was no erroneous, unauthorized, extraneous or irrelevant exercise of judicial discretion (see para 65).

[Bahasa Malaysia summary

Tertuduh telah dipertuduhkan di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Penting) No 22 tahun 1970 ('Ordinan') di Mahkamah Tinggi Melaka. Pada dasarnya, tiga pertuduhan yang telah dibuat terhadap tertuduh ('pertuduhan-pertuduhan tersebut') adalah pada tiga mesyuarat yang berasingan diadakan di bilik mesyuarat Majlis Perbandaran Eksekutif Negeri Melaka ('EXCO tersebut'), sebagai ahli kepada pentadbiran itu, seperti juga ahli EXCO, beliau telah melakukan amalan menerima rasuah dengan menggunakan kedudukan awamnya untuk mendapat faedah kewangan di mana beliau telah terlibat dalam mesyuarat dan keputusan EXCO berkaitan tiga permohonan berasingan oleh Ivory Heights Sdn Bhd ('Ivory Heights') yang mana beliau mempunyai kepentingan. Pihak pembela berhujah bahawa tertuduh tiada neksus dengan Ivory Heights, dan menegaskan bahawa tertuduh bukanlah alter egonya. Tambahan pula pihak pembela telah berhujah bahawa dua cek tunai berjumlah RM500,000 yang mana tertuduh telah mendepositkan ke dalam akaun-akaunnya dan isterinya di Lembaga Urusan Tabung Haji Melaka ('akaun-akaun LUTH tersebut') adalah sebahagian daripada jumlah RM675,000 yang merupakan hasik jualan dua keping tanah pertanian tertuduh di Mukim Macap ('tanah Macap') kepada SP52 melalui satu perjanjian jualbeli bertarikh 2 Jun 1995 ('PJB tersebut'). Selepas satu perbicaraan yang berlarutan, tertuduh didapati bersalah dan disabitkan. Atas setiap pertuduhan, beliau dijatuhkan hukuman dua tahun penjara yang bermula serentak, denda RM20,000 atau enam bulan penjara jika gagal sebaliknya ('hukuman tersebut'). Beliau telah merayu terhadap kedua-dua sabitan dan hukuman. Ia juga dihujahkan bagi pihak tertuduh bahawa hukuman yang dikenakan adalah melampau.

Diputuskan, menolak rayuan tertuduh terhadap sabitan dan hukuman:

(1) Di bawah s 2(2) Ordinan tersebut, ungkapan 'member of the administration' mempunyai maksud yang telah diberikan kepadanya dalam perkara 160(2) Perlembagaan Persekutuan. Berdasarkan keterangan yang dikemukakan dalam perbicaraan, ia telah dibuktikan dan sememangnya ia tidak dipertikaikan bahawa pada tarikh-tarikh yang dinyatakan dalam pertuduhan-pertuduhan tersebut, tertuduh merupakan ahli EXCO dan justeru itu ahli kepada pentadbiran itu sebagaimana yang ditafsirkan dalam s 2(2) (lihat perenggan 7–8).

(2) Hakim perbicaraan yang bijaksana adalah betul dalam penemuannya bahawa tertuduh telah menggunakan kedudukan awamnya sebagai ahli EXCO dan melibatkan diri dengan sengaja dalam dan persetujuan untuk kesemua tiga permohonan oleh Ivory Heights dalam tiga mesyuarat EXCO tersebut (lihat perenggan 14).

(3) Istilah 'pecuniary advantage' dalam s 2(2) hendaklah ditafsirkan dengan meluas. Ia termasuklah apa-apa faedah yang boleh diukur atau dinilai dalam bentuk kewangan. Dalam konteks fakta dalam rayuan ini, aliran jumlah RM500,000 ke akaun-akaun LUTH tersebut adalah jelas merupakan kelebihan dari segi kewangan yang terakru ke atas tertuduh akibat daripada tertuduh yang menggunakan kedudukan awamnya sebagai ahli EXCO dalam

mesyuarat-mesyuarat EXCO, dan oleh itu ia terangkum dalam skop amalan melakukan rasuah di bawah s 2(2) (lihat perenggan 22–23).

(4) Perkaitan neksus, sebenar dan penting antara tertuduh dan Ivory Heights telah terbentuk oleh penglibatan sistematik tertuduh dalam urusan Ivory Heights dari langkah permulaan lagi pada 22 Februari 1994 apabila beliau membeli Ivory Heights untuk RM2,300, diikuti oleh permohonan Ivory Heights untuk tanah Negeri, dan kejadian seterusnya seperti yang nyatakan sehingga penemuan semula fail Ivory Heights bersama dokumen-dokumen korporat dan cap getahnya dalam rumahnya, berikutan serbuan oleh pegawai-pegawai ACA pada 18 Oktober 1996 (lihat perenggan 46). Tiada keraguan bahawa berdasarkan fakta berikut, tertuduh pada setiap masa matan pengarah bayangan Ivory Heights. Sebagai seorang pengarah bayangan, beliau terangkum dalam lingkungan dan skop perkataan 'director' yang ditafsirkan s 4(1) Akta Syarikat 1965 sebagai termasuklah 'a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act' (lihat perenggan 50).

(5) Hakim perbicaraan yang bijaksana dijustifikasikan dalam menolak pembelaan itu. Adalah jelas bahawa PJB tertuduh tidak lengkap. Ia didapati mengandungi beberapa kecacatan dan luar aturan serius yang nyata mendedahkan transaksi tanah Macap itu adalah satu penyamaran yang tampaknya direka oleh tertuduh bagi tujuan mengaburi atau melenyapkan aliran RM500,000 itu ke dalam akaun-akaun LUTH tersebut. Berdasarkan satu analisis dan penilaian munasabah berhubung keterangan yang dikemukakan di perbicaraan tersebut, adalah jelas bahawa RM500,000 dalam akaun-akaun LUTH tersebut sebenarnya berasal secara terus keseluruhan dan eksklusifnya daripada bayaran pendahuluan yang SP52 terima daripada Tay Kim Pong menurut perjanjian saham yang mana SP52 telah menjualkan sahamnya dalam Ivory Heights yang memiliki tanah Negeri yang telah dipertimbangkan dan diluluskan oleh EXCO tersebut menurut tiga permohonan oleh Ivory Heights yang mana tertuduh pada setiap masa matan tersebut telah menggunakan kawalan de facto (lihat perenggan 54).

(6) Hukuman yang dikenakan oleh hakim perbicaraan yang bijaksana dalam lingkungan hukuman statutori maksimum yang ditetapkan dalam s 2(1) Ordinan tersebut. Tiada penggunaan budi bicara kehakiman yang salah, tidak diberi kuasa, melampau atau relevan (lihat perenggan 65).]

Notes

For cases on corrupt practice, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2002–2007.

Cases referred to

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193 (refd)
E v Comptroller General of Inland Revenue [1970] 2 MLJ 117 (refd)
HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 157 (refd)
Haji Abdul Ghani bin Ishak & Anor v PP [1981] 2 MLJ 230 (refd)
Hydrodam (Corby) Ltd, Re (1994) 2 BCLC 180 (refd)

Nunis v PP [1982] 2 MLJ 114 (refd)
PP v Dato Haji Mohamed Muslim bin Haji Othman [1983] 1 MLJ 245 (refd)
PP v Dato' Waad bin Mansor [2005] 2 MLJ 101 (refd)
PP v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166 (refd)
Tesco Supermarkets Ltd v Nattrass [1972] AC 153 (refd)
Unisoft Group Ltd (No 2), Re (1994) BCC 766 (refd)
Yue Sang Cheong Sdn Bhd v PP [1973] 2 MLJ 77 (refd)

Legislation referred to
Companies Act 1965 s 4(1)
Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1), (2)
Federal Constitution art 160(2)
Penal Code
Prevention of Corruption Act 1961

Appeal from: Criminal Trial Nos 45–2 of 1997, 45–3 of 1997 and 45–4 of 1997 (High Court, Malacca)

Peter Siew Kuan Onn (Bernard Gomes with him) for the appellant.
Nordin bin Hassan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Low Hop Bing JCA (delivering judgement of the court):

INTRODUCTION

[1] The accused faces three charges under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('Ordinance 22') in the Melaka High Court. After a protracted trial, he was found guilty and convicted. On each charge, he was sentenced to two years' imprisonment to run concurrently, and a fine of RM20,000 or six months in default (collectively 'the sentence').

[2] This is the accused's appeal against the conviction and sentence.

[3] For brevity and convenience, a reference hereinafter to a section is a reference to that section in Ordinance 22, unless the context otherwise requires.

THE CHARGES

[4] In essence, the three charges preferred against the accused (collectively 'the charges') are that at three separate meetings held at the meeting room of the Melaka State Executive Council ('the EXCO'), as a member of the administration, to wit, a member of the EXCO, he committed corrupt practice by using his public position for his pecuniary advantage in that he did take part in the meetings and decisions of the EXCO in relation to three separate applications by Ivory Heights Sdn Bhd ('Ivory Heights') in which he had an interest. The dates and time of the meetings, and the particulars of the applications may be tabulated as follows:

Date and Time Particulars of Applications of Meetings

(1) 7 September 1994 — For alienation of State at about 10 am land in the mukim of Bertam and the mukim of Bachang, in the district of Melaka Tengah for 60 years mukim lease under PT 463 comprising 3.3718ha and 60 years State lease under PT 4799 comprising 6.8230ha (collectively 'the State land').

(2) 21 December 1994 — For conversion of the period at about 10 am of lease from 60 years to 99 years in respect of the State land alienated to Ivory Heights on 7 September 1994.

(3) 23 August 1995 — For the areas of the State at about 10 am land alienated to Ivory Heights on 7 September 1994 to be extended from 3.3718ha to 3.6204ha in respect of land under PT463, and from 6.8230ha to 7.2019ha in respect of the land under PT 4799.

ESSENTIAL INGREDIENTS

[5] Specifically in relation to the charges, it is incumbent on the prosecution to prove the following essential ingredients:

(1) that the accused was a member of the administration; and

(2) that in such capacity, he committed corrupt practice:

(a) by using his position for his pecuniary or other advantage;

(b) by taking part in the EXCO meeting on a matter relating to his trade, business or profession; or

(c) by taking part in any decision likely to affect his pecuniary interest therein.

(See, eg *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230 at p 232, per Wan Yahya J (later SCJ) and *Public Prosecutor v Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166 at p174, per Chang Min Tat FJ (as he then was).

[6] In the instant appeal, the pertinent ingredients for consideration and determination are (1) and (2a) above.

MEMBER OF THE ADMINISTRATION

[7] Under s 2(2), the expression 'member of the administration' has the meaning assigned to it in art 160(2) of the Federal Constitution which, where relevant, merits reproduction as follows:

> Member of the administration' means in relation to a State, a person... holding office as member (other than an official member) of the Executive Council;

[8] On the evidence adduced at the trial, it has been established and indeed it has never been disputed that on the dates stated in the charges, the accused was a member of the EXCO and hence a member of the administration as defined in s 2(2) (see also

Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman [1983] 1 MLJ 245 at p 246 (HC), per Hashim Yeop A Sani J (later CJ (Malaya)).

USE OF POSITION

[9] In addition to my analysis later in this judgment, it is uncontroverted that in his position as an EXCO member, the accused did attend the aforesaid EXCO meetings in which the aforesaid applications of Ivory Heights were deliberated and approved, and that the accused had neither declared his interest in Ivory Heights nor left the meetings.

[10] The cumulative effect of the accused's conduct clearly evinces his intention not to disqualify or avoid a conflict of interest. The accused has indeed failed to divorce himself completely from the necessity of having to make the decisions: See the judgment of Abu Mansor Ali J (later FCJ) in *Wong Voon @ David Wang Chang Vun v Public Prosecutor*, Kota Kinabalu High Court, Criminal Appeal No 24 of 1994.

[11] The accused's conduct clearly constituted the doing of an act forbidden by law, thereby supplying the mens rea against the accused.

[12] Illustrations of similar situations may be found in the case of a Melaka State EXCO member's participation in the deliberation of an application for State land in Alor Gajah which eventually benefited him and hence resulted in his conviction: *Haji Abdul Ghani Ishak* at p 231, which was affirmed by the Federal Court on appeal at p 248.

[13] The physical presence of an accused who was an EXCO member at the relevant EXCO meeting which approved his application for land was sufficient in the circumstances for him to be regarded in law to have used his public position for his pecuniary advantage, and his silence did not make him any less an actor in the play, even when his application had already been duly processed and the land office has allotted to him a piece of land in the area earmarked for EXCO members, and the land committee had approved his application even prior to the EXCO's deliberation and approval: *Public Prosecutor v Dato Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245 at p 248 (HC).

[14] On the evidence adduced at the trial, I am of the view that the learned trial judge was correct in his finding that the accused had used his public position as an EXCO member and participated in the deliberation of and approval for all the three applications by Ivory Heights in the three EXCO meetings.

PECUNIARY ADVANTAGE

[15] The learned trial judge has specifically found as a fact that there was a flow of a sum of RM500,000 to the accused's and his wife's accounts in the Melaka Lembaga

Urusan Tabung Haji ('the LUTH accounts'), and that pecuniary advantage has been proved.

[16] In my view, the origin of this RM500,000 may be traced to the evidence adduced at the trial that the accused had given instructions to Ivory Heights' director-cum-shareholder Othman Kassim (SP52) to sign a sale and purchase agreement dated 10 May 1995 in exh P127 in which SP52 agreed to sell his share in Ivory Heights to the purchaser, one Tay Kim Pong, for a total consideration of RM2,743,604 (' the share agreement').

[17] Upon signing the share agreement, SP52 received a deposit by way of an initial payment vide OCBC cash cheque No S43305 in exh P128 for RM737,671.50, out of which SP52 deposited in the same bank the following sums:

	Account	RM
(a)	SP52's A/C No 735-105919-6	287,671.50
(b)	SP52's wife, Laila Mariam bte Pudzil, A/C No735-105921-8	250,000.00

[18] The balance of RM200,000 was deposited in SP52's account in Chung Khiaw Bank.

[19] On 2 June 1995, SP52 drew two cash cheques viz OCBC cheque No 292802 in exh P138 for RM250,000 and OCBC cheque No 292778 in exh P143 for the same amount, making a total sum RM500,000. SP52 then handed these two cash cheques to one Luwe Sang Kau who was Ivory Heights' other director-cum-shareholder for onward transmission to the accused who subsequently deposited the same in his LUTH accounts on 8 June 1995.

[20] In so far as it is relevant to the charges, s 2(2) defines 'corrupt practice' as any act done by any EXCO member in his capacity as such member, whereby he has used his public position for his pecuniary advantage.

[21] The definition of corrupt practice in s 2(2) has widened the campaign against bribery and corruption, and covers any corrupt practice which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act 1961: *Tan Cheng Swee & Ors*, at p 178 (FC); *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230, pp 245–247; *Dato Haji Mohamed Muslim*, p 247 (HC); and *Nunis v Public Prosecutor* [1982] 2 MLJ 114 at p 117, per Abdul Hamid FJ (later Chief Justice of Malaysia).

[22] The expression 'pecuniary advantage' in s 2(2) must be construed widely. It includes any benefit which may be measured or valued in monetary or financial terms.

A **[23]** In the context of the facts in this appeal, the flow of the sum of RM500,000 to the LUTH accounts was clearly a pecuniary advantage accruing to the accused as a result of the accused using his public position as an EXCO member in the EXCO meetings, and so comes within the ambit of corrupt practice under s 2(2).

B NEXUS

[24] Learned defence counsel Mr Peter Siew Kuan Onn, assisted by Mr Bernard Gomes, submitted that the accused had no nexus with Ivory Heights, adding that the accused was not its alter ego.

C

[25] In response, learned deputy public prosecutor Mr Nordin Bin Hassan relied on the learned trial judge's finding of facts, and contended that such a nexus existed.

[26] I am of the view that the issue of the nexus between the accused and Ivory **D** Heights is clearly a question of mixed fact and law.

[27] Primary facts may be established by way of direct evidence. Additionally or alternatively, facts may also be established by a combination of direct and indirect or circumstantial evidence, from which reasonable inferences may be drawn and **E** specifically found as secondary facts.

[28] The learned trial judge has addressed the issue of nexus by looking at a combination of direct and indirect evidence, and a summary of his finding of primary and secondary facts may be unfolded as follows.

F

[29] The accused had on 22 February 1994 bought Ivory Heights at an agreed price of RM2,300 from one Shamsiah bte Ayub (SP8).

[30] The accused then telephoned and informed SP8 that he would send his driver **G** to pay the agreed price and collect all Ivory Heights' documents in the file, which the accused's driver did.

[31] The accused then appointed Mustadza & Associates as Ivory Height's company secretaries; and instructed one of them, Hj Mustadza bin Abu Bakar (SP9) **H** to appoint Md Yusop Omar (SP16) and Jaini bin Ahmad (SP15) as directors-cum-shareholders, whose particulars were given by the accused in order to replace the original directors-cum-shareholders viz A Raniamal (SP5) and Ng Bee Chin (SP6).

I **[32]** On 11 March 1994, Ivory Heights submitted an application in exh P3a to the Melaka Tengah land office ('the land office') for an alienation of about 10 ha of State land in the mukim of Bertam so as to develop a fishery project ('the fishery project'). A file in exh P80 was opened for the purpose of processing the application. A thank-you card dated 7 March 1994 bearing the accused's name and signature was found therein.

[33] On 9 April 1994, the land office vide letter in exh P25a informed Ivory Heights that the State land for which Ivory Heights had applied was situated in two different mukims viz Bertam and Bachang. A

[34] On 7 May 1994, Ivory Heights submitted handwritten application in exh P4a for the State land in the mukim of Bachang. The handwriting thereon was proved to be of the same authorship as the accused's sample handwriting in exh P13a and P14a. B

[35] Vide letter dated 30 June 1994, the Town and Country Planning Department had placed on record its objection to Ivory Heights' application on the grounds that the alienation of the State land for the fishery project would run counter to the Government's plan of beautifying the Melaka River, and that the fishery project in the vicinity of the industrial area in Bertam and Bachang was eminently unsuitable as the water quality would be adversely affected by the flow of effluents from industrial toxic waste. C D

[36] Apart from that, the Director of the Fishery Department of Negeri Sembilan and Melaka (SP17) had, vide letter dated 12 July 1994 in exh P75, submitted his report to the land office, stating that his department could not support Ivory Heights' application because the State land was acidic and again not suitable for the fishery project. E

[37] However, a few days later, SP17 received a telephone call from the Director of Drainage and Irrigation Department Melaka (SP19), requesting SP17 to review the letter in exh P75 as Ivory Heights' application was submitted by the accused who had personally requested SP19 to call SP17. The accused was at the material time the Chairman of the EXCO Committee of Pembangunan Desa dan Pertanian (Country and Agricultural Development). F

[38] As a result of SP19's call, SP17, being desirous of maintaining a sound departmental relationship with the accused, has vide letter dated 25 July 1994 in Exh P76 reversed the objection, apparently on the ground that modern technology was conducive to the development of the fishery project. G

[39] The accused subsequently requested Othman Kassim (SP52) to become a director-cum-shareholder of Ivory Heights by signing Form 48A (exh P45) which was sent to SP52 by the accused's driver who subsequently returned it to the accused. H

[40] Acting on the accused's instructions, Mustadza & Associates had on 31 March 1995, vide Form 49 in exh P43, replaced Ivory Heights' directors-cum- shareholders viz Jaini Ahmad (SP15) and Md Yusop Omar (SP16) with new directors-cum-shareholders viz Othman Kassim (SP52) and the said Luwe Sang Kau. I

[41] The accused then directed Hj Mustadza bin Abu Bakar (SP9) and Rohana Mat Amin (SP10) to resign as Ivory Heights' company secretaries. They did so, vide

letters both dated 27 March 1995 in exhs P58 and P62 respectively, whereupon the accused personally went to SP10's office and settled all the secretarial fees in the sum of RM1005.

[42] The accused then instructed his driver to collect Ivory Heights' file in exh P32 containing all its corporate documents and rubber stamp from SP10 who delivered the same to the accused's driver who in turn handed them over to the accused personally. Ivory Heights' file and rubber stamp were recovered in the accused's house when Anti Corruption Agency ('ACA') officers raided it on 18 October 1996.

[43] Ivory Heights shared the same address as Syarikat Usaha Jaya Sdn Bhd ('Usaha Jaya') at No 23, Jalan Laksamana Cheng Ho, Air Leleh 75000 Melaka. Norhayati Kassim (SP13) a clerk in Usaha Jaya testified that upon receiving two of Ivory Heights' letters at the said address, she contacted the accused who confirmed that those letters were meant for him. SP13 then sent one of the letters in exh P64 to the accused by way of facsimile while the other letter was collected by the accused personally at the said address.

[44] I am of the view that on the above specific finding of facts, the learned trial judge was correct in holding that the nexus between the accused and Ivory Heights has been established.

[45] It is obvious that the accused was totally aware of the events that had taken place in Ivory Heights and was always in command of the situation.

[46] The linkage, real and substantial connection or nexus between the accused and Ivory Heights had been constituted by the accused's systematic participation in the affairs of Ivory Heights right from the initial step on 22 February 1994 when he purchased Ivory Heights for RM2,300, followed by Ivory Heights' application for the State land, and the subsequent events as alluded to above until the recovery of the file of Ivory Heights together with its corporate documents and rubber stamp in his house, consequent upon a raid by ACA officers on 18 October 1996.

[47] There can be no doubt that on the facts the accused was at all material time the directing mind and will of Ivory Heights, and controlled what it did, thereby making him the alter ego of Ivory Heights (see *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 157, p 172 per Lord Denning MR, cited with approval in *E v Comptroller General of Inland Revenue* [1970] 2 MLJ 117, p 128 (FC)).

[48] The accused was at all material time an embodiment of Ivory Heights and his mind is that of Ivory Heights (see *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, p 170 per Lord Reid, followed in *Yue Sang Cheong Sdn Bhd v Public Prosecutor* [1973] 2 MLJ 77 (FC)).

[49] The accused was indeed the puppeteer who pulled the strings of his puppets viz SP52 and the said Luwe Sang Kau who were directors-cum-shareholders of Ivory Heights and who danced to the tune of the accused.

[50] Further, in fact and in law, the accused was at all material time a shadow director of Ivory Heights. As a shadow director, he comes within the ambit and purview of the word 'director' which is defined s 4(1) of the Companies Act 1965 as including 'a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act' (see *Company Law* by Walter Woon (2nd Ed) at pp 222–223).

[51] In *Re Hydrodam (Corby) Ltd* (1994) 2 BCLC 180, p 182, Millett J gave a picturesque description of a shadow director in the following words:

> … A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadow, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company.

[52] The totality of the accused's aforesaid conduct clearly fits the above description of a shadow director. Although the accused was apparently an outsider, he was in de facto control of Ivory Heights in which the de jure directors viz SP52 and the said Luwe Sang Kau were accustomed to act on the accused's directions or instructions: *Re Unisoft Group Ltd (No 2)* (1994) BCC 766 per Harman J at pp 774–775; and *Corporate Powers, Controls Remedies And Decision-Making* by Loh Siew Cheang, 1996 p.208.

RM500,000 IN LUTH ACCOUNTS

[53] It was submitted for the defence that the two cash cheques amounting to RM500,000 which the accused had subsequently deposited in the LUTH accounts were part of the sum of RM675,000 being the proceeds of sale of the accused's two pieces of agricultural land viz Lot 2253, with an area of 5A 1R 1P and Lot 2482 with an area of 1A or 1P in the Mukim of Macap (collectively 'the Macap land') to SP52 vide sale and purchase agreement dated 2 June 1995 in Exh. D193 ('the SPA'). The learned trial judge had rejected this defence on inter alia the following grounds:

(a) Despite the execution of the SPA on 2 June 1995, the transfer of the Macap land to SP52 was not registered until some 17 months later, ie on 1 November 1996, which was soon after the ACA had commenced their investigations on 17 September 1996 and raided the accused's house on 18 October 1996 (collectively, 'the ACA investigations and raid').

(b) Although para. 1 of the SPA stated that SP52 had paid a deposit of RM567,500 to the accused on 2 June 1995, the accused had not taken any step to settle the relatively meagre outstanding loan of RM55,000 to the chargee bank for the purpose of obtaining a discharge of charge and redeeming the title to Lot 2482. Instead, the redemption of title took place on 21 February 1997, which is some 20 months later, but soon after the ACA investigations and raid;

(c) The SPA contains other manifest irregularities, eg:

    (i) Part 9 of the First Schedule thereto stated Messrs Bell & Lee as the purchaser's solicitors when the purchaser SP52 had never appointed them;

(ii) The accused had allegedly executed the SPA before a witness, but he was unable to identify who the witness was;

(iii) The solicitor's name, firm and seal were neither filled in nor affixed to at the relevant places in the SPA;

(iv) Payment of the balance of the purchase price was not made through the aforesaid Messrs Bell & Lee but instead through another solicitor, the late Mr Michael Tan Lip Yip of Messrs Tan Lip Yip & Co. During his life time, Mr Tan had never been appointed by SP52 or the accused in the SPA for the purposes of undertaking follow-up actions pursuant thereto. In law and in fact, Mr Tan was a complete stranger to the SPA; and

(v) Although the SPA was signed on 2 June 1995, it was not stamped until some 17 months later, ie on 8 November 1996, which was again soon after the ACA investigations and raid.

[54] In my view, the learned trial judge is justified in rejecting the defence. It is abundantly clear that the accused's device of the SPA had faltered. It has been found to contain serious fundamental flaws and irregularities which have in reality revealed that the Macap land transaction was a camouflage apparently invented by the accused for the purpose of blurring or erasing the flow of the RM500,000 into the LUTH accounts. However, upon a reasonable analysis and evaluation of the evidence adduced at the trial, the truth that has emerged is that the RM500,000 in the LUTH accounts had actually originated directly, wholly and exclusively from the initial payment which SP52 had received from the said Tay Kim Pong pursuant to the share agreement in which SP52 has sold his share in Ivory Heights which owned the State land which in turn had been deliberated and approved by the EXCO pursuant to the three applications by Ivory Heights over which the accused has at all material time exercised de facto control, as alluded to earlier in this judgment.

CONVICTION

[55] On the foregoing grounds, I am of the view that the learned trial judge is correct in holding that the prosecution has proved the charges against the accused beyond reasonable doubt and hence in convicting him. The accused's appeal against conviction is therefore dismissed.

SENTENCE

[56] It was submitted for the accused that the sentence imposed on the accused was manifestly excessive.

[57] The prosecution disagreed, adding that the sentence does not involve any error of law. Support was sought in:

(i) *Public Prosecutor v Dato Waad bin Mansor* [2005] 2 MLJ 101 (FC);

(ii) *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 (FC); and

(iii) *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 (FC).

[58] I note that in imposing the sentence, the learned trial judge referred to: **A**

(i) Section 2(1) which provides for a maximum imprisonment term of 14 years or a maximum fine of RM20,000 or both;

(ii) The objectives of sentencing such as:

(a) retribution; **B**

(b) deterrence;

(c) protection of society; and

(d) rehabilitation of the offender.

C

[59] His Lordship examined some of the sentences meted out by our courts in which members of the administration had been convicted under s 2, eg:

Accused Sentence

(i) *Haji Abdul Ghani bin Ishak* — One year imprisonment (High Court) which was affirmed by the Federal Court. **D**

(ii) *Dato' Haji Mohamed Muslim bin Haji Othman* — One day imprisonment and RM2000 fine.

[60] The learned trial judge also considered the following circumstances: **E**

(i) the accused's position as a member of the administration and, during his tenure, his contribution to the State of Melaka;

(ii) the accused's condemnation of himself and his family with ostracisation from the publice at large, due to his avarice; **F**

(iii) the absence of remorse on the part of the accused;

(iv) the accused's act in garnering assistance from government servants and people in the private sector for his personal gains;

(v) the accused's conduct in concealing direct involvement and detection, and fabrication of evidence when confronted by ACA officers; and **G**

(vi) the RM500,000 stashed away by the accused in the LUTH accounts.

[61] In this regard, the issue for consideration is whether the learned trial judge has erred in meting out the sentence. **H**

[62] In my judgment, the process of sentencing involves an exercise of judicial discretion on the basis of the facts and circumstances prevailing in each particular case. For this purpose, it is instructive to refer to the Federal Court judgment, delivered with unrivalled clarity by Raja Azlan Shah Ag LP (now HRH the Sultan of Perak) in *Bhandulanand Jayatilake*, at p 84, as follows: **I**

> ... the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what

A it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 552, p 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is
B for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

For a discretionary judgment of this kind to be reversed by this court, it must be shown to
C our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion.

[63] The above authoritative statement was applied by the Federal Court through the judgment of Mohamed Dzaiddin Chief Justice Malaysia (as he then was) in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2002] 3 CLJ 457, 493e–i, 494a–h and d–g.
D There the accused faced four charges of corrupt practice under s 2(1), to wit, whilst being a member of the administration, the accused had unlawfully used his public position to his advantage by directing two senior police officers to obtain four written statements from two persons denying their earlier accusations of misconduct and
E sodomy against the accused, thereby saving him from embarrassment and criminal proceedings. The accused's appeal against inter alia the sentence of six years imprisonment on each of the charges was dismissed by both the Court of Appeal and the Federal Court.

F **[64]** The above two authorities were in turn cited by the Federal Court through the judgment of Alauddin Mohd Sheriff FCJ in *Public Prosecutor v Dato' Waad Mansor* [2005] 1 CLJ 421. The accused there was a member of the Negeri Sembilan State Legislative Assembly, an EXCO member and a member of the Tampin District Land Committee. At the trial before the High Court, he was acquitted and discharged.
G The Public Prosecutor's appeal was allowed by the Court of Appeal and the accused was convicted of three amended charges under s 2(1), to wit, using his political position by taking part in decisions inter alia to approve an application for quarry land by a company called Teraju Nusantara Sdn Bhd in which he had an interest. He was sentenced to a fine of RM15,000 or six months imprisonment in default,
H on each amended charge. The Public Prosecutor's further appeal against the sentence was allowed by the Federal Court, on the ground that in the absence of extenuating circumstances the proper sentence should be imprisonment. Hence, the fines imposed by the Court of Appeal were set aside and substituted with the sentence of two years imprisonment on each amended charge, the sentences to run concurrently.

I **[65]** Reverting to the instant appeal, I am unable to identify any extenuating circumstance. I find that the sentence imposed by the learned trial judge is well within the statutory maximum sentence prescribed in s 2(1). I am unable to find any erroneous, unauthorized, extraneous or irrelevant exercise of judicial discretion. Hence, I am not inclined to invoke the powers of appellate interference.

[66] The accused was at the material time a wakil rakyat (people's representative) and a holder of public position. It is absolutely essential for this court to send an important message: holders of public positions are trustees of the powers reposed in them by the people. Therefore, the beneficiaries are none other than the people. The people have made it possible for the trustees to be placed in these public positions. As such trustees, their first and foremost duty is to promote and act in the best interest of the people and the country as a whole. These public positions are not for the holders to help themselves. The paramount consideration is to help the people. There must be no negation or compromise of this paramount consideration.

[67] On the above grounds, the appeal against sentence is also dismissed. The imprisonment term and fines imposed by the learned trial judge is hereby affirmed.

[68] My learned brothers Mokhtar Sidin and Raus Sharif JJCA have read this judgment in draft and have expressed their Lordships' concurrence with it.

Appeal dismissed.

Reported by Loo Lai Mee